United States District Court
For the Northern District of California

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6   IN THE UNITED STATES DISTRICT COURT

7   FOR THE NORTHERN DISTRICT OF CALIFORNIA

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9   LILITH GAMES (SHANGHAI) CO.   ) Case No. 15-CV-01267-SC
     LTD.,   )
10   ) ORDER DENYING PLAINTIFF'S
                 Plaintiff,   ) MOTION FOR PRELIMINARY
11   ) INJUNCTION
         v.   )
12   )
)
13   UCOOL, INC. AND UCOOL LTD.,   )
)
14   Defendants.   )
)
15   _____)

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18   **I.   INTRODUCTION**

19   Now before the Court is Plaintiff Lilith Games Co.'s

20   ("Lilith") motion for preliminary injunction. ECF No. 30 ("Mot.").

21   Lilith brings this motion to enjoin Defendants uCool, Inc. and

22   uCool LTD ("uCool") from "any further misappropriation of Lilith's

23   trade secret" and from "reproducing, copying, preparing any

24   derivative works, and/or distributing any of Lilith's registered

25   copyrights . . . which necessarily includes Lilith's code that is

26   now unlawfully contained in uCool's game Heroes Charge . . . ."

27   Mot at 24.

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1 The motion is fully briefed,[1] and oral argument was held on

2 September 11, 2015. Having considered the parties' submissions,

3 argument, and the relevant law, and for the reasons discussed

4 herein, Lilith's motion to preliminarily enjoin uCool is DENIED,

5 and uCool's evidentiary objections are OVERRULED.

6

7 **II. BACKGROUND**

8   Plaintiff Lilith is a video game developer that released the

9 game Dao Ta Chuan Qi (translated as "Sword and Tower")[2] in China in

10 February 2014. Lilith holds Chinese copyright registrations in

11 Sword and Tower's Lua[3] source code and alleges that it owns the

12 copyrights to that code pursuant to Chinese copyright law. Sword

13 and Tower has enjoyed great commercial success, and as of August

14 2014, was the leading game in Asia. Mot. at 5.

15   Defendant uCool is a video game marketer who allegedly

16 obtained access to Lilith's copyrighted software code for Sword and

17 Tower and used it to create its own game, Heroes Charge, which it

18 published in the United States in August 2014. ███████████████

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25 [1] ECF Nos. 69 ("Opp'n"), 77 ("Reply"), 87-1 ("Surreply").

26 [2] The game has also been referred to as "Dota Legends". See, e.g.,
   ECF No. 43-01 ¶ 2.

27 [3] Lua is a programming language commonly used to develop video
   games.

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6   Lilith first learned of uCool's allegedly unlawful copying in

7 August 2014, at which point it attempted to resolve the dispute by

8 issuing a take-down notice to Apple.[5] The parties then exchanged

9 correspondence through the end of November 2014, when those talks

10 stalled without any action from Apple regarding the takedown

11 request.

12   In March 2015, Lilith decided to release Sword and Tower in

13 countries outside of China including the United States, Japan, and

14 certain European countries. Because of the similarities between

15 the games and because Heroes Charge was already active in many of

16 these countries, many users believed that Sword and Tower had been

17 copied from Heroes Charge and posted comments to that effect on the

18 internet. See Mot. at 12-13. Lilith cites these comments as

19 evidence that uCool's alleged copying has created ongoing damage to

20 Lilith's reputation and confusion in the marketplace. Id. Lilith

21 also claims that it has been unable to enter into an exclusive

22 distribution agreement in the United States as a result of the

23 presence of Heroes Charge in the US market. Id.

24   Shortly thereafter on March 18, 2015, Lilith filed this action

25 -- four months after talks with uCool had broken down. Lilith

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[4] See https://www.youtube.com/watch?v=GdGKx_IhVbg

27 [5] Heroes Charge is sold through the Apple and Android (Google Play)
   app stores.

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1   argues that the four month delay was justified because Lilith is a

2   small start-up[6] and was reluctant to become involved in costly

3   litigation until it was necessary. Filing suit was not necessary

4   until March 2015, according to Lilith, because the harm to Lilith

5   in the form of damage to its reputation and its inability to secure

6   exclusive distribution agreements did not become apparent until

7   March 2015 when Lilith attempted to enter markets where Heroes

8   Charge had already been released.

9   In its first claim for relief for copyright infringement,

10 Lilith alleges that uCool copied Lilith's copyrighted source code

11 embodied in Sword and Tower and used it to create the source code

12 for Heroes Charge. Because Sword and Tower is not a United States

13 work as defined in 17 U.S.C. Section 101, Lilith brings its

14 copyright infringement claim under the Berne Convention, an

15 international agreement governing copyright.

16   In its second claim for relief, Lilith alleges that 240,000

17 lines of Lua code embodied in Sword and Tower is a trade secret and

18 that uCool knowingly misappropriated that trade secret in violation

19 of California's Uniform Trade Secrets Act (Cal. Civ. Code § 3426,

20 et seq.) when it allegedly used Lilith's code to create Heroes

21 Charge. In support of its trade secret claim, Lilith has presented

22 evidence of efforts made to maintain the confidentiality of its

23 source code. For example, Lilith stores the source code on a

24 secure server and limits access only to those employees who need it

25 to perform their duties. Lilith also encrypts the Sword and Tower

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27 [6] It is unclear what Lilith means by "small start-up," particularly
given that Lilith owns the most popular game in Asia.

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1 source code so that it cannot be easily deciphered. Of the twenty-

2 one employees who have had access to the source code, however, only

3 five signed confidentiality agreements prior to this litigation.

4   Two weeks after filing its complaint, Lilith filed a motion

5 for preliminary injunction. ECF No. 17. On April 22, 2015, Lilith

6 withdrew its motion as a result of a dispute with uCool relating to

7 a mutual exchange of source code for analysis but re-filed the

8 motion on May 5, 2015. On June 4, 2015, the Court granted uCool's

9 motion for an extension of time so that both sides could perform

10 limited discovery prior to the close of briefing on this motion,

11 including a mutual exchange of source code. ECF No. 48. In

12 response to Lilith's discovery requests, uCool produced a new

13 version of the Heroes Charge source code that had yet to be

14 released. This new version was written in a different programming

15 language called C#. Subsequently, uCool also produced portions of

16 the Lua version of the Heroes Charge source code. Both parties

17 analyzed the code that was produced and submitted expert

18 declarations as part of their briefing on this motion. See ECF

19 Nos. 69-17 ("Kitchen Decl."), 74-4 ("Roman Decl."), 109 ("Suppl.

20 Roman Decl."). In addition to the briefs and supporting papers,

21 the Court heard oral argument on September 11, 2015, at which the

22 parties agreed they could be ready for trial in approximately nine

23 months.

24

25 **III. LEGAL STANDARD**

26   Before a court can grant preliminary injunctive relief, a

27 plaintiff must first "establish that he is likely to succeed on the

28 merits, that he is likely to suffer irreparable harm in the absence

1 of preliminary relief, that the balance of equities tips in his

2 favor, and that an injunction is in the public interest." Marlyn

3 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 877

4 (9th Cir. 2009) (citations omitted). This is commonly referred to

5 as the "four-factor test." See, e.g., Sierra Forest Legacy v. Rey,

6 577 F.3d 1015, 1021 (9th Cir. 2009).

7   Although it was once Ninth Circuit law that a plaintiff in

8 copyright cases was entitled to a presumption of irreparable harm

9 on a showing of likelihood of success on the merits, the Supreme

10 Court ended that practice in eBay Inc. v. MercExchange, L.L.C..

11 See 547 U.S. 388, 393-94 (2006) ("[T]his Court has consistently

12 rejected invitations to replace traditional equitable

13 considerations with a rule that an injunction automatically follows

14 a determination that a copyright has been infringed."). Two years

15 later in Winter v. Natural Res. Def. Council, Inc., the Court

16 further held that the Ninth Circuit's rule allowing for a mere

17 "possibility" of irreparable harm was insufficient. See 555 U.S.

18 7, 20 (2008). Thus, as the Ninth Circuit has since clarified,

19 "even in a copyright infringement case, the plaintiff must

20 demonstrate a likelihood of irreparable harm as a prerequisite for

21 injunctive relief." Flexible Lifeline Sys. v. Precision Lift,

22 Inc., 654 F.3d 989, 998 (9th Cir. 2011) (emphasis added).

23 Moreover, because a preliminary injunction "is an extraordinary

24 remedy never awarded as of right," a district court may decide to

25 deny a preliminary injunction pursuant to its equitable discretion

26 even where success on the merits is likely. Winter, 555 U.S. at

27 24; see 17 U.S.C. § 502(a) (providing that a court "may . . . grant

28 temporary and final injunctions on such terms as it may deem

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1 reasonable to prevent or restrain infringement of a copyright")

2 (emphasis added); eBay Inc., 547 U.S. at 391 (2006); Perfect 10,

3 Inc. v. Google, Inc., 653 F.3d 976, 980 (9th Cir. 2011).

4   Although eBay and Winters require district courts to consider

5 each of the factors of the four-factor test before granting a

6 preliminary injunction, the Ninth Circuit has held that the factors

7 may be balanced such that "a stronger showing of one element may

8 offset a weaker showing of another." Alliance for the Wild Rockies

9 v. Cottrell, 632 F.3d 1127, 1131 (9th Cir.2011).

10   In denying a preliminary injunction, however, a court need not

11 make findings on all four factors if fewer factors are dispositive

12 of the issue. See Winter, 555 U.S. at 23–24 ("A proper

13 consideration of [the balance of hardships and the effect of the

14 preliminary injunction on the public interest] alone requires

15 denial of the requested injunctive relief. For the same reason, we

16 do not address the lower courts' holding that plaintiffs have also

17 established a likelihood of success on the merits."); Global

18 Horizons, Inc. v. United States Dep't of Labor, 510 F.3d 1054, 1058

19 (9th Cir. 2007) ("Once a court determines a complete lack of

20 probability of success or serious questions going to the merits,

21 its analysis may end, and no further findings [on irreparable harm,

22 balance of hardships, or public interest] are necessary.").

23

24 **IV. DISCUSSION**

25   **A.   Mootness**

26   In its opposition, uCool argues that Lilith's motion is moot

27 because uCool recently completed a rewrite of the Heroes Charge

28 source code using a different programming language. This new

7

1 version of Heroes Charge uses the programming language C# instead

2 of Lua, the language used by Lilith to write the source code for

3 Sword and Tower. Lilith's expert, however, presented evidence in

4 his declaration showing that the source code is still substantially

5 similar notwithstanding the rewrite, including significant portions

6 that were "literally copied and are identical" or "copied and then

7 translated, modified, reordered, or otherwise obscured in such a

8 way that common code comparison programs would not be able to

9 detect the similarities." Roman Decl. ¶ 43. uCool counters that

10 (1) Lilith's analysis only specifically pointed to 19 lines of

11 code, (2) C# is so different from Lua "that the new code cannot

12 have been copied from Lilith's code but must have been built from

13 scratch", and (3) Lilith's analysis focused on external files and

14 abstract elements that are not related to the code at issue.

15 Surreply at 4.

16   The C# version of Heroes Charge was being used by less than 1%

17 of users as of the date of the hearing on this motion. Over 99% of

18 users continue to use a Lua version of the game, which the parties

19 agree contains "significant similarities" to the Lua code embodied

20 in Sword and Tower. Kitchen Decl. ¶ 135. The parties' dispute

21 over whether the C# version of Heroes Charge is substantially

22 similar to the Lua version of Sword and Tower, therefore, is

23 largely academic. Furthermore, as explained in subsequent

24 sections, insofar as the C# version of Heroes Charge merely

25 translated Lilith's code from Lua to C#, it would still infringe on

26 Lilith's copyright in the same way that a French translation of an

27 English novel would infringe on the latter's copyright.

28   Accordingly, the Court finds that Lilith's motion is not moot.

1   **B.   Likelihood of Success on the Merits**

2   Lilith pleads two claims in its Second Amended Complaint:

3   copyright infringement and trade secret misappropriation. See ECF

4   No. 83 ("SAC"). While Lilith must set forth evidence to support a

5   likelihood of success on at least one of its claims, it need not

6   demonstrate an absolute certainty of success. See Abdul Wali v.

7   Coughlin, 754 F.2d 1015, 1024-1025 (2d Cir. 1985); Netlist Inc. v.

8   Diablo Techs., Inc., No. 13-cv-05962, 2015 U.S. Dist. LEXIS 3285,

9   at *19-20 (N.D. Cal. Jan. 12, 2015).

10   **1.   Copyright Infringement**

11   In order to demonstrate a likelihood of success on its

12   copyright claim, Lilith must show (1) ownership of a valid

13   copyright and (2) copying of the original elements of the protected

14   work. Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340,

15   361 (1991).

16   **a.   Ownership**

17   Because Lilith claims it owns a Chinese copyright to the

18   source code in Sword and Tower, ownership is a question of Chinese

19   law. See Lahiri v. Universal Music & Video Distribution, Inc., 513

20   F. Supp. 2d 1172, 1174 n.4 (C.D. Cal. 2007).

21   Article 59 from the People's Republic of China Copyright Law

22   ("PRCCL") provides that the State Council is responsible for

23   setting measures for the protection of computer software. ECF No.

24   69-2 ("PRCCL Amendments") at 25-26 ("Article 59: Measures for the

25   protection of computer software and of the right of communication

26   through information network shall be formulated separately by the

27   State Council.") (emphasis added). Pursuant to that mandate, the

28   ///

1 State Council has issued Regulations on Computer Software

2 ("Software Regulations").   ECF No. 77-9 ("Chu Decl.") ¶ 9.

3   Article 7 of the Software Regulations states that registration

4 of a copyright is <u>prima facie</u> evidence of copyright ownership.   <u>Id.</u>

5 ¶¶ 10-12.   The Software Regulations also state that the "copyright

6 in a piece of software belongs to its developer."   <u>Id.</u> ¶ 10.   If an

7 organization's "name is mentioned in connection with a piece of

8 software," the organization, "shall, in the absence of proof to the

9 contrary, be its developer."   <u>Id.</u>   In addition, Article 13 provides

10 that, if an employee develops a piece of software in the course of

11 his or her employment, the employer is the owner if just one of the

12 following conditions are met:

> (1) the software is developed based on the development objective explicitly designated in the line of his service duty;
>
> (2) the software is a foreseeable or natural result of his work activities in the line of his service duty; or
>
> (3) the software is developed mainly with the material and technical resources of the legal entity or other organization, such as funds, special equipment or unpublished special information, and the legal entity or other organization assumes the responsibility thereof.

20 <u>Id.</u> ¶ 13.

21   Here, Lilith owns valid Chinese copyright registrations and

22 therefore has provided <u>prima facie</u> evidence of copyright ownership

23 under Chinese law.   ECF Nos. 17-1 ¶ 4, 17-2.   In addition, it is

24 undisputed that Lilith is the entity that filed for and obtained

25 the copyright registrations and that these registrations expressly

26 list Lilith as the copyright owner.   Thus, Lilith is the developer

27 of the <u>Sword and Tower</u> source code and the copyright for <u>Sword and</u>

28 <u>Tower</u> consequently belongs to Lilith.   Finally, even though the

source code for <u>Sword and Tower</u> was developed by Lilith's

employees, Lilith retains ownership of the copyright even if it did

not secure assignments from those employees because it meets all of

the conditions set out in Article 13 of the Software Regulations.

For these reasons, the Court finds that Lilith is likely to

prove copyright ownership at trial.

b.   Copying

Copying can be established by either presenting direct

evidence of copying, or absent that, circumstantial evidence that

the infringer (1) had access to the copyrighted work, and (2) that

the parties' works are substantially similar. <u>L.A. Printex Indus.

Inc. v. Aeropostale, Inc.</u>, 676 F.3d 841, 846 (9th Cir. 2012).

i.   Access

"Circumstantial evidence of reasonable access is proven in one

of two ways: (1) a particular chain of events is established

between the plaintiff's work and the defendants access to that work

. . . , or (2) the plaintiff's work has been widely disseminated."

<u>Three Boys Music Corp. v. Bolton</u>, 212 F.3d 477, 482 (9th Cir.

2000).

uCool's access is demonstrated by the fact that Lilith's

copyright declaration can be found in at least one version of

<u>Heroes Charge</u>. <u>See</u> ECF No. 19 ("Ray Decl.") (providing a video

recording of the copyright declaration appearing in <u>Heroes Charge</u>).

Lilith also argues that uCool had access because <u>Sword and Tower</u>

has been widely disseminated since its release in February 2014.

It is unclear, however, how this latter argument is relevant unless

the source code is included anytime a user downloads the game from

the app store. It is the Court's understanding that the source

1 code is not disseminated with the game itself, and therefore the

2 fact that Sword and Tower has been "downloaded over 29 million

3 times through one distribution channel alone" does not help to

4 establish access. Mot. at 16. Regardless, based on the presence

5 of Lilith's copyright declaration alone, the Court concludes that

6 Lilith is likely to satisfy the element of access at trial.

7   **ii.   Substantial Similarity**

8   Computer programs, including video games, are protected under

9 copyright law as literary works containing both literal and non-

10 literal elements.[7] See Miller v. Facebook, Inc., No. C 10-00264

11 WHA, 2010 WL 2198204, at *4 (N.D. Cal. May 28, 2010). Just as the

12 literal elements of a book are the words themselves, the literal

13 elements of a computer program are the alphanumeric instructions

14 written by a programmer -- i.e., the source code. See Johnson

15 Controls, Inc. v. Phoenix Control Sys., Inc., 886 F.2d 1173, 1175

16 (9th Cir. 1989). This can be contrasted with the non-literal

17 elements, expressive aspects of the source code steps removed from

18 the alphanumeric instructions themselves. In the case of a book,

19 non-literal elements include the characters, setting, and plot

20 created by the words on the page. Similarly, the non-literal

21 elements of a computer program include expressive elements created

22

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23 [7] The distinction between literal and non-literal elements is
    separate from the distinction between literal and non-literal
24 copying. See Altai, 982 F.2d at 701-02. "Literal" copying is
    verbatim copying of original expression. "Non-literal" copying is
25 "paraphrased or loosely paraphrased rather than word for word."
    Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807, 814 (1st Cir.
26 1995). Both types of copying are unlawful, and both are at issue
    in this case. The Court uses the word "literal" in this order,
27 however, to distinguish the types of protectable elements, not as a
    synonym for verbatim copying.

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by the source code: the code's order, sequence, and structure; the user interface (including artwork and other visual elements embodied in the code); and -- in the case of sophisticated video games -- the plot, characters, and setting of the game. See id. at 1175. It is well established that copyright protection for a computer program extends to both literal and non-literal elements of a computer program. See id.; Computer Associates Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 702 (2d Cir. 1992). Thus, the Court will examine each in turn.

1.   Literal Elements

Substantial similarity in the literal elements of a computer program can be demonstrated either by showing verbatim (or near verbatim) copying of the source code or that the "fundamental essence" of the code was duplicated. See 4-13 Nimmer on Copyright § 13.03. Returning to the book analogy, the fundamental essence of a book passage is duplicated when an infringer paraphrases the passage or simply translates it into a different language. Similarly, copying will be found where source code is translated from one programming language to another or where insignificant changes are made, such as replacing certain terms, reordering lines of code, or adding or removing comments.[8] See also Roman Decl. ¶ 53 (listing common methods used to obfuscate copying).

If at least some amount of copying can be shown, whether the works are substantially similar turns on whether the copying is

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[8] Similarly, such minor variations violate a copyright holder's exclusive right to create derivative works. See 1-3 Nimmer on Copyright § 3.01 ("a work will be considered a derivative work only if it would be considered an infringing work . . . .").

1 sufficiently extensive to constitute a substantial portion of the

2 plaintiff's work. 4-13 Nimmer on Copyright § 13.03. "The

3 quantitative relation of the similar material to the total material

4 contained in plaintiff's work is certainly of importance. However,

5 even if the similar material is quantitatively small, if it is

6 qualitatively important, the trier of fact may properly find

7 substantial similarity." Id.

8   Lilith embedded within the Sword and Tower source code a

9 copyright declaration that, if triggered, results in a pop-up

10 window that reads "LILITH GAMES ©." Lilith provided the Court with

11 convincing evidence that at least one version of Heroes Charge

12 contains the code that triggers this copyright declaration. See

13 Ray Decl.. Although uCool claims it was unable to replicate the

14 pop-up, it conspicuously fails to identify the version of Heroes

15 Charge used in those attempts -- that is, whether it used the same

16 version used by Lilith (Version 1.8.1) or whether it used later

17 versions that uCool had changed subsequent to the start of this

18 litigation to prevent the pop-up from appearing. uCool also

19 refused to provide this information in discovery. ECF No. 77-1 ¶¶

20 3, 9, 11.

21   The appearance of Lilith's copyright declaration in uCool's

22 game is sufficient to establish more than a de minimis level of

23 copying. See Brocade Commc'ns Sys v. A10 Networks, Inc., No. 10-

24 3428 PSG, 2013 U.S. Dist. LEXIS 8113, at *34-36 (N.D. Cal. Jan. 10,

25 2013) (holding that the copying of 145 lines of copyrighted code

26 provided substantial evidence that defendants' actions exceeded

27 merely de minimis copying of code). If that were not enough,

28 Lilith presented other evidence of widespread duplication. For

example, Lilith provided the Court with side-by-side comparisons of the source code in Sword and Tower as compared to the C# version of Heroes Charge. The comparisons show that much of the code in Heroes Charge is identical, merely translated into C#, or insignificantly modified. See, e.g., Roman Decl. ¶¶ 70, 71, 74, 79, 87, 88, 97-99. Lilith also provided the Court with comparisons of the source code in Sword and Tower as compared to a Lua version of Heroes Charge. The comparison showed again that much of the code is identical. See, e.g., Suppl. Roman Decl. ¶¶ 16-20, 22.

Considering the literal elements of the source code alone, the Court finds that a finder of fact is likely to conclude that the source code for Heroes Charge is substantially similar to the source code for Sword and Tower. Nevertheless, the Court also examines the non-literal elements of the source code in the following section.

2.   Non-Literal Elements

Whether the non-literal elements of a program "are protected depends on whether, on the particular facts of each case, the component in question qualifies as an expression of an idea, or an idea itself." Id. The Ninth Circuit has endorsed an "abstraction-filtration-comparison" test formulated by the Second Circuit and expressly adopted by several other circuits. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1525 (9th Cir. 1992) ("In our view, in light of the essentially utilitarian nature of computer programs, the Second Circuit's approach is an appropriate one."). As the Second Circuit explains, this test has three steps. In the abstraction step, the court identifies which aspects of the program constitute its expression and which are the ideas. In the

filtration step, the court "sift[s] out all non-protectable material," including ideas and "expression that is necessarily incidental to those ideas." Id. at 706. In the final step, the court compares the remaining creative expression with the allegedly infringing program.

In the expert declaration of Kendyl Roman, Lilith provided an analysis of the non-literal elements of the Lua source code from Sword and Tower and the C# source code from Heroes Charge. Mr. Roman states that he applied the abstraction-filtration-comparison test in his analysis. Mr. Roman, however, failed to document his application of each step, and it is not entirely clear as a result whether all of the similarities to which he points are protected by copyright. Nevertheless, it is clear that there are substantial similarities across a significant number of copyrighted elements. For example, at the component level of abstraction, similar groups of files are found in similar directories, such as the files for the user interface. Roman Decl. ¶ 67. In addition, at the flow chart level of abstraction, the sequences show that the same algorithm is being implemented. Id. ¶ 80. Further, at the parameter list level of abstraction, the function calls show identical and equivalent parameter lists. Id. ¶ 81. Finally, at the function level of abstraction, many of the functions are identical and show up in the same order inside the file. Id. ¶ 82.

Lilith also presents evidence of significant similarities between the Lua versions of both games. See generally Suppl. Roman Decl.. Although uCool attempts to dispute some aspects of Lilith's analysis, uCool's own expert admitted in his declaration that "there are significant similarities between the Lua source code for

1   Heroes Charge and the Lua source code for [Sword and Tower],

2   including similarities in [non-literal elements such as] structure,

3   function calls, and parameter values."   Kitchen Decl. ¶ 135.

4   After considering expert reports from both sides, the Court

5   finds that a finder of fact is likely to conclude that the non-

6   literal elements of both the Lua and C# versions of Heroes Charge

7   are substantially similar to the non-literal elements of Sword and

8   Tower.

3.   User Interface

10   The forgoing analysis is sufficient to establish that Lilith

11   is likely to succeed in showing substantial similarity at trial.

12   This includes evidence that uCool copied the source code itself

13   (verbatim, with slight modifications, or by translating it from Lua

14   to C#) as well as non-literal elements of the source code,

15   including its structure, sequence, and organization. The question

16   remains, however, whether the Court should also take into

17   consideration the visual elements of the games as they appear on

18   the computer screen as well as other aspects perceived by users

19   (collectively "the user interface"[9]).

20   Both parties assert that Lilith's claims "present a relatively

21   straightforward question of whether uCool copied Lilith's protected

22   source code -- a question that will be largely resolved by

23   comparing the alphanumeric instructions read by a computer . . . ."

24   ECF No. 61 at 1-2, Opp'n at 1. Lilith also argues, however, that

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26   [9] "The user interface, also called the 'look and feel' of the
     program, is generally the design of the video screen and the manner
27   in which information is presented to the user. Johnson Controls,
     Inc., 886 F.2d at 1176 n.3.
28

1 the similarities in the games' user interfaces are relevant because

2 they "constitute circumstantial evidence of uCool's unlawful

3 copying [of the Sword and Tower source code]" (Reply at 8). In

4 addition, Lilith points in its Second Amended Complaint ("SAC") to

5 the user interface as one of the expressive elements of its source

6 code protected by its copyright. See SAC ¶ 13 (providing various

7 screenshots comparing the visual elements of the two games).

8 uCool, however, contends that the Court should strike these and

9 similar references in Lilith's filings because Lilith "waived any

10 argument that it is asserting a copyright in the [user interface]"

11 and admitted in its opposition to the motion to intervene "that

12 comparing screen images is irrelevant to this lawsuit." Opp'n at

13 23. For the reasons set forth below, Lilith's objection is

14 OVERRULED and its request to strike is DENIED.

15   Lilith did not waive its ability to point to the visual

16 similarities between the games. It included in its SAC screenshots

17 comparing the user interfaces. Further, the Court agrees with

18 Lilith that it would not have been relevant to this case to compare

19 the intervenors' images with the parties' images.[10] After all,

20 whether the parties' images infringed the intervenors' copyrighted

21 images is immaterial to whether uCool infringed Lilith's

22 copyrighted source code. The same cannot be said, however, about

23

24 [10] On August 17, 2015, the Court denied a motion to intervene, in
   part, because the intervenors' claims focused entirely on the
   visual similarities between their games and certain characters in

25 Heroes Charge and Sword and Tower. ECF No. 93. In its order, the
   Court agreed with Lilith and uCool that intervention would be

26 inappropriate because the intervenors' claims had nothing to do
   with Lilith's source code. The order, however, was not intended to

27 imply that the visual similarities between Heroes Charge and Sword
   and Tower are irrelevant to this case.

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1   the similarities between the parties' images.

2   A video game copyright protects all of the copyrightable

3   elements of that game. While it is true that the copyright laws

4   separately protect the user interface of a computer game as an

5   independent audiovisual work (see Data E. USA, Inc. v. Epyx, Inc.,

6   862 F.2d 204, 206 (9th Cir. 1988)), courts have also held that a

7   user interface is a non-literal element of the program's source

8   code (see Johnson Controls, Inc., 886 F.2d at 1175; Lotus Dev.

9   Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 63-65 (D. Mass.

10   1990); see also Torah Soft Ltd. v. Drosnin, 136 F. Supp. 2d 276,

11   283 (S.D.N.Y. 2001) (connecting the visual output of a computer

12   program with the underlying program itself)). Consistent with that

13   view, the Copyright Office issues a single copyright registration

14   that protects all of a game's copyrightable elements, regardless of

15   whether the game is registered as a literary or audiovisual work.

16   See 17 U.S.C. § 102(b); 37 C.F.R. § 202.1. Thus, although Lilith's

17   claim is focused on its source code, that claim includes all of the

18   non-literal expressive elements of that code as well, including the

19   user interface.

20   uCool argues that copyright protection as it relates to a

21   video game's source code should be considered separately from a

22   game's audiovisual aspects because, in part, there are many ways

23   one can write source code to achieve the same audiovisual output.

24   For that reason, the argument goes, similarities as to the

25   audiovisual outputs are not probative of whether the copyright in

26   the source code was violated.

27   While it is true that one cannot conclude based on a game's

28   visual similarities that the literal alphanumeric instructions

19

1   written by the programmer are the same, that is not the point.

2   Indeed, there are many different ways to write a book to achieve

3   the same non-literal expressive elements of plot, setting,

4   character, and so forth, whether through the selection of different

5   words or the use of different languages. Insofar as the non-

6   literal expressive elements of that book are substantially the same

7   as another copyrighted book, however, the former has infringed on

8   the latter regardless of whether the words themselves have been

9   copied. Likewise, infringement will be found where the non-literal

10 elements expressed by a game's source code -- including the user

11 interface -- are substantially similar to another game, even though

12 there are many different ways to write the source code to create

13 those non-literal elements. For that reason, the Court rejects

14 uCool's attempts to limit the analysis merely to whether the

15 alphanumeric code itself was copied verbatim; copyright analysis is

16 not so simplistic.

17   Accordingly, the Court finds that the user interface of <u>Sword</u>

18 <u>and Tower</u> is one of the various non-literal elements of the source

19 code protected by Lilith's copyright, including the visual elements

20 as depicted through screenshots in Lilith's complaint, motion, and

21 supporting papers. uCool's objection is therefore OVERRULED.

22   Given the significant evidence of copying in the previous two

23 sections, the Court need not engage in a full analysis of whether

24 the protected elements of the games' user interfaces are

25 substantially similar. It is clear, however, that the striking

26 similarities between the games' protected elements such as the

27 visual appearance of characters and settings further support the

28 Court's conclusion that Lilith is likely to prove substantial

1   similarity at trial. Indeed, the evidence shows that the games are

2   almost identical from the user's standpoint, with only minor

3   modifications. See Mot. 7-10; ECF No. 30-18 ("Yang Decl.") ¶¶ 3-

4   13, Ex. A.

5   For the forgoing reasons, the Court finds that Lilith is

6   likely to succeed on its copyright infringement claim.

7   **2.   Trade Secret Misappropriation**

8   In order to demonstrate a likelihood of success on its trade

9   secret claim under California's Uniform Trade Secrets Act

10 ("CUTSA"), Lilith must show (1) the existence of a trade secret,

11 and (2) misappropriation of the trade secret. AccuImage

12 Diagnostics Corp. v. Terarecon, Inc., 260 F. Supp. 2d 941, 950

13 (N.D. Cal. 2003) (citing Cal. Civ. Code § 3426.1(b)).

14   **a.   Existence of a Trade Secret**

15   Under California law, a trade secret is defined as something

16 that (1) derives independent economic value, actual or potential,

17 from not being generally known to the public or to other persons

18 who can obtain economic value from its disclosure or use; and (2)

19 is the subject of efforts that are reasonable under the

20 circumstances to maintain its secrecy. Cal. Civil Code §

21 34.26.1(b).

22   Here, it cannot be questioned that Lilith derives independent

23 economic value from Sword and Tower and by extension its protected

24 source code. What is at issue is whether Lilith made reasonable

25 efforts to maintain the source code for Sword and Tower as a

26 secret.

27   Reasonable efforts to maintain the secrecy of certain

28 information include limiting access to the information, advising

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1 employees of the existence of a trade secret, requiring employees

2 to sign nondisclosure agreements, and keeping secret documents

3 under lock. See Religious Technology Center v. Netcom On-Line

4 Communication Services, Inc., 923 F. Supp. 1231, 1253 (N.D. Cal.

5 1995). "[F]ailure to employ the fullest range of protective

6 techniques will not terminate the secrecy provided that the

7 techniques employed were, in and of themselves, reasonably

8 prudent." 1-1 Milgrim on Trade Secrets § 1.04.

9   The Court finds that Lilith's efforts to maintain the

10 confidentially of its source code, while not as rigorous as they

11 could have been, were sufficiently reasonable to maintain the code

12 as a trade secret. Lilith keeps its source code on a secure server

13 and limits access only to those employees who need it to perform

14 their duties. Lilith also encrypts the Sword and Tower source code

15 so that it cannot be easily deciphered. Although Lilith failed to

16 secure confidentiality agreements from all of the employees that

17 had access to the code, Lilith has presented evidence to show that

18 these employees understood Lilith's code to be confidential

19 business information. Further, there is no evidence to suggest

20 that any of these employees disclosed the code to a third party.

21   **b.   Misappropriation**

22   uCool does not address the misappropriation element in its

23 opposition or surreply. Regardless, the Court takes it up here and

24 finds that Lilith is likely to succeed on this element as well.

25   Misappropriation can be established by either acquisition or

26 disclosure/use:

27   (b) Misappropriation means:

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22

(1) Acquisition of a trade secret of another without express or implied consent by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

    (A) Used improper means to acquire knowledge of the trade secret; or

    (B) At the time of the disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

        (i) derived from or through a person who had utilized improper means to acquire it;

        (ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

        (iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

Cal. Civ. Code § 3426.1. As explained below, Lilith has shown misappropriation by both acquisition and use.

Lilith provided evidence showing that uCool acquired and used the source code embodied in Sword and Tower without Lilith's consent. As detailed in the Court's copyright analysis above, Lilith has provided significant evidence showing that uCool copied its source code. This includes convincing evidence that at least one version of Heroes Charge (Version 1.8.1) included a portion of Lilith's code that triggers Lilith's copyright notice. Insofar as there was copying, there is no dispute that it was done without Lilith's consent.

Lilith also provided evidence showing that uCool knew or had reason to know that the source code was acquired by improper means

1 or in breach of a duty to maintain its secrecy. "Improper means"

2 is defined as "theft, bribery, misrepresentation, breach or

3 inducement of a breach of a duty to maintain secrecy, or espionage

4 through electronic or other means." Cal. Civ. Code § 3426.1.

5 uCool would have known, or should have known, that the source code

6 that it copied in order to create Heroes Charge belonged to Lilith

7 given that the user interface is almost identical to Sword and

8 Tower, with which uCool would have been familiar given Sword and

9 Tower's significant success in the video game market. Further, it

10 is well known that source code is the confidential property of a

11 game's owner. In that context, it is likely that a trier of fact

12 will infer that uCool knew the code was acquired through improper

13 means or in breach of a duty because Lilith would not have given

14 its competitor, uCool, free access to its code.

15   For these reasons, the Court finds that Lilith is likely to

16 succeed on its trade secret misappropriation claim.

17   **C.   Irreparable Harm**

18   Lilith must provide "evidence and reasoned analysis" that the

19 remedies available at law, such as monetary damages, are inadequate

20 to compensate for that injury." eBay, 547 U.S. at 391.

21 Alleged harm that is remote or speculative will not be considered

22 irreparable; rather, the movant must demonstrate that the

23 threatened harm is imminent. See Colorado River Indian Tribes v.

24 Town of Parker, 776 F.2d 846, 849-851 (9th Cir. 1985).

25   Lilith advances two theories to support its assertion that it

26 will suffer irreparable harm in the absence of a preliminary

27 injunction: damage to its reputation and its alleged inability to

28 secure an exclusive distribution agreement in the United States.

1   Loss of goodwill, as well as damage to reputation, can support

2   a finding of irreparable harm. See Rovio Entm't, Ltd. v. Royal

3   Plush Toys, Inc., No. C 12-5543 SBA, 2012 U.S. Dist. LEXIS 169020,

4   *29-33, (N.D. Cal. Nov. 27, 2012). Lilith argues that it has

5   suffered reputational damage because some users have posted

6   comments on the internet accusing Lilith of copying Heroes Charge.

7   For the reasons set forth below, however, the Court is not

8   convinced that anecdotal comments on the internet establish a

9   likelihood of irreparable harm sufficient to justify extraordinary

10   relief in the form of a preliminary injunction.

11   Lilith points to Rovio Entm't, Ltd. v. Royal Plus Toys, Inc..

12   Id. In Rovio, the defendant was allegedly selling unauthorized

13   knockoff plush toys that were inferior but nearly identical in

14   appearance to the plaintiff's products in violation of its

15   copyrights and trademarks. Id. at *1. The court held that the

16   plaintiff suffered irreparable harm, in part, because (1)

17   irreparable harm in trademark cases includes a loss of trade, (2)

18   defendant's product threatened plaintiff's reputation because it

19   posed a potential public health risk, and (3) the potential harm to

20   plaintiff was significant given the "great energy, time and money"

21   plaintiff had spent building its reputation. Id. at *31-32.

22   Although Lilith's evidence suggests the possibility of some

23   damage to its reputation, unlike the plaintiffs in Rovio, Lilith

24   has not expended great energy, time, and money to build its

25   reputation outside of Asia in the markets where its reputation has

26   allegedly been damaged by uCool. Indeed, Lilith is a relative

27   newcomer to the United States, Europe, and other markets where

28   Heroes Charge has been released. Moreover, unlike in Rovio where

25

1   the inferiority of the defendant's product was primarily

2   responsible for plaintiff's reputational damage, it does not appear

3   that Heroes Charge is necessarily inferior to Sword and Tower.

4   Thus, while there is the potential for confusion in the market

5   given the similarities between the games, the damage to Lilith's

6   reputation caused by this confusion is relatively small. The

7   potential damage is even more limited given that the parties, as

8   stated during the hearing on this motion, are likely to go to trial

9   in only nine months' time.

10   Instead of facing irreparable harm to its reputation, Lilith

11   is primarily facing challenges to its ability to expand into new

12   markets. Heroes Charge was released in the United States over a

13   year before Sword and Tower and has built up a significant base of

14   users after an aggressive marketing campaign. Lilith cannot easily

15   penetrate this market given the popularity of Heroes Charge and the

16   fact that Sword and Tower is incredibly similar from a user's

17   perspective. Although Lilith has been able to secure nonexclusive

18   distribution agreements for the release of Sword and Tower in the

19   United States, it is likely that it would have been able to secure

20   much better terms but for the presence of Heroes Charge in the

21   marketplace. The difference in value between an exclusive and

22   nonexclusive distribution contract, however, does not constitute

23   irreparable harm given that it can be quantified and remedied

24   through monetary damages.

25   Because Lilith has failed to establish that it will suffer

26   imminent harm that cannot be remedied with monetary damages, the

27   Court finds for uCool on this factor.

28   ///

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1   **D.**   **Balance of the Equities**

2   "In each case, courts 'must balance the competing claims of

3 injury and must consider the effect on each party of the granting

4 or withholding of the requested relief.'" <u>Winter</u>, 555 U.S. at 24

5 (quoting <u>Amoco Prod. Co. v. Gambell</u>, 480 U.S. 531, 542 (1987)). In

6 doing so, the court balances the injury faced by the applicant for

7 an injunction against the injury that would be sustained by the

8 defendant if relief were granted. <u>See</u> <u>American Motorcyclist Ass'n</u>

9 <u>v.Watt</u>, 714 F.2d 962, 966-967 (9th Cir. 1983); <u>Brooktree Corp. v.</u>

10 <u>Advanced Micro Devices, Inc.</u>, 705 F. Supp. 491, 497 (S.D. Cal.

11 1988).

12   Here, the balance of the equities tips in uCool's favor. If

13 the Court were to grant Lilith's motion, uCool would be forced to

14 take down its most popular game, threatening uCool's viability as a

15 company. <u>See also</u> <u>Open Text, S.A. v. Box, Inc.</u>, 36 F. Supp. 3d

16 885, 910 (N.D. Cal. 2014) ("A preliminary injunction is a drastic

17 remedy and the hardship on a preliminarily enjoined party who is

18 required to withdraw its product from the market before trial can

19 be devastating."). uCool would not only lose profits but would

20 continue to incur a significant amount of fixed costs associated

21 with <u>Heroes Charge</u>. Further, the harm to uCool would likely be

22 irreparable. Even if uCool was able reintroduce <u>Heroes Charge</u>

23 after trial, it would likely struggle to recapture its lost market

24 share. Given the dynamic and fast-moving nature of the video game

25 industry, there is a good chance that once users are no longer able

26 to use <u>Heroes Charge</u>, they will simply move on to another game. In

27 addition, if <u>Heroes Charge</u> was suddenly unavailable for play, uCool

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would likely suffer from a significant loss of goodwill, making it

difficult to create trust with players in the future.

The equities are also affected by the eight months that passed

from when Lilith discovered the alleged copying to when it filed

for a preliminary injunction. Lilith first learned of uCool's

allegedly unlawful copying in August 2014, at which point it

attempted to resolve the dispute by issuing a take-down notice.

The parties then exchanged correspondence through the end of

November 2014, when those talks stalled without any resolution.

Lilith then waited an additional four months before filing this

suit, during which time uCool invested millions of dollars in

Heroes Charge, including an ad that ran during the Super Bowl.

Lilith argues that the four-month delay was justified because it

was reluctant to become involved in costly litigation until it was

necessary. Lilith claims filing suit was not necessary until March

2015 because the harm to its reputation and its inability to secure

exclusive distribution agreements did not become apparent until

March 2015. These challenges were foreseeable given the similarity

between the games, but even assuming that Lilith was justified in

waiting, the delay still affects the equities in this case. uCool

made huge investments during those four months that would likely be

lost if the Court were to grant a preliminary injunction.

In contrast, Lilith does not face significant irreparable harm

if an injunction is denied. As discussed in the previous section,

if successful at trial (a mere nine months from now), Lilith could

recover significant monetary damages that would compensate it for

past harm. At that point, it could also ask the Court to

permanently enjoin uCool from distributing Heroes Charge moving

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1   forward.

2   For these reasons, the Court finds that the balance of

3   equities tips in favor of uCool.

4   **E.   Public Interest**

5   If evidence of infringement is strong, then the public

6   interest favors its abatement given that the public has an interest

7   in seeing the copyright laws enforced. See <u>Flextronics Int'l, Ltd.</u>

8   <u>v. Parametric Tech., Corp.</u>, 2013 U.S. Dist. LEXIS 133403, *28 (N.D.

9   Cal. Sept. 16, 2013). However, "[i]n the typical case, [this]

10   consideration adds little . . . [except where] the public interest

11   implicates separate issues." 5-14 Nimmer on Copyright § 14.06.

12   Here, evidence of infringement is strong, and therefore the

13   public interest tips towards granting the injunction. However,

14   because there are no issues relating to the public interest

15   separate from Lilith's likelihood of success on the merits, the

16   public interest factor does not weigh heavily in the Court's

17   analysis.

18   **F.   Balancing the Factors**

19   Having assessed each factor individually, the Court -- using

20   its equitable discretion -- weighs the factors together to

21   determine whether an injunction should ultimately issue. Judge

22   Posner of the Seventh Circuit aptly described the task at hand:

23   A district judge asked to decide whether to grant or deny
          a preliminary injunction must choose the course of action
24   that will minimize the costs of being mistaken. Because
          he is forced to act on an incomplete record, the danger
25   of a mistake is substantial. And a mistake can be
          costly. If the judge grants the preliminary injunction
26   to a plaintiff who it later turns out is not entitled to
          any judicial relief -- whose legal rights have not been
27   violated -- the judge commits a mistake whose gravity is
          measured by the irreparable harm, if any, that the
28   injunction causes to the defendant while it is in effect.

1   Am. Hosp. Supply Corp. v. Hosp. Products Ltd., 780 F.2d 589, 593

2   (7th Cir. 1986).

3   Accordingly, the Court will only grant an injunction if the

4   irreparable harm to Lilith if the injunction is denied, multiplied

5   by Lilith's likelihood of success on the merits, exceeds the

6   irreparable harm to uCool if the injunction is granted, multiplied

7   by the likelihood that Lilith will not succeed on the merits.[11]

8   See id.; see also Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073,

9   1099 (9th Cir. 2014) (applying a similar test). Although exact

10 figures cannot be calculated, this formula provides the analytical

11 framework within which the Court must make its decision.

12   This is a close case. Lilith has demonstrated a strong

13 likelihood of success on the merits. Indeed, prior to the Supreme

14 Court's decisions in eBay and Winter, such a showing would have

15 compelled the Court to grant the requested relief. After

16 considering the remaining factors, however, the Court finds that

17 granting a preliminary injunction at this juncture would be

18 inappropriate. Lilith has not shown a likelihood of irreparable

19 harm. Further, because of the extent of the irreparable harm to

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25 [11] This framework can also be represented formulaically: Grant
26 preliminary injunction if but only if $P * H_p > (1 - P) * H_d$, where $P =$
    Lilith's probability of success on the merits, $H_p =$ the irreparable
27 harm to the plaintiff if the injunction is not granted, and $H_d =$
    the irreparable harm to the defendant if the injunction is granted.
28 Id.

the defendant if the injunction is granted, the balance of equities

tips decidedly in uCool's favor.

V.   <u>CONCLUSION</u>

For the forgoing reasons, Lilith's motion for preliminary

injunction is DENIED.   uCool's evidentiary objections are

OVERRULED.

IT IS SO ORDERED.

Dated: September 23, 2015

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UNITED STATES DISTRICT JUDGE